Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CHARLES KIBAARA NYAGA; DOIN KAINYU KIBAARA,

Petitioners,

v.

JOHN ASHCROFT, Attorney General;
ROSEMARY LANGLEY MELVILLE, District Director,
Atlanta Division of the Bureau of Customs
and Immigration Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Court of Appeals erroneously concluded that the diversity visa statutes, to wit, 8 U.S.C. §§ 1153(c)-(g) and 8 U.S.C. § 1154(a)(1)(I), prohibit the Government from processing Charles Kibaara Nyaga and Doin Kainyu Kibaara's diversity visa applications as if the 1998 fiscal year had not ended, where only 51,565 of the available 55,000 diversity visas were issued in 1998 and where the only reason the Nyagas' applications were not processed is the Government's failure to take any action whatsoever on the Nyagas' applications, which were submitted with seven months remaining in the fiscal year.

2. Whether the Eleventh Circuit Court of Appeals erroneously concluded that mandamus is improper where the Government failed to process the Nyagas' applications for diversity visas prior to the end of the applicable fiscal year, where the Nyagas completed the application process with seven months remaining in the fiscal year, where the Government failed to take any action whatsoever on the Nyagas' applications during such seven months and where the Government issued only 51,565 of the available 55,000 diversity visas during such fiscal year.

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The opinion of the Federal District Court for the Northern District of Georgia is reported at 186 F. Supp. 2d 1244 (N.D. Ga. 2002), and is reprinted in Appendix B. The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 323 F.3d 906 (11th Cir. 2003) and is reprinted in Appendix A. The order denying Petitioners' Request for Rehearing En Banc is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on March 5, 2003. On April 21, 2003, Petitioners filed a timely Request for Rehearing En Banc. The Petition for Rehearing En Banc was denied by order dated June 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The United States Constitution, Article I, § 8 provides, in pertinent part that: "The Congress shall have Power . . . to establish a uniform rule of Naturalization."

28 U.S.C. § 1254(1). Courts of appeals; certiorari; certified questions provides in pertinent part as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> **(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1331. Federal question provides in pertinent part as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361. Action to compel an officer of the United States to perform his duty provides in pertinent part as follows:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

8 U.S.C. § 1153(c)(1) provides in pertinent part as follows:

> **(c) Diversity immigrants**
>
> **(1) In general**
>
> Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:
>
> * * * *

8 U.S.C. § 1153(c)(1)(E)(i)-(ii) provides in pertinent part as follows:

> **(E) Distribution of visas**
>
> **(i) No visas for natives of high-admission states**
>
> The percentage of visas made available under this paragraph to natives of a high-admission state is 0.
>
> **(ii) For low-admission states in low-admission regions**
>
> Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a low-admission region is the product of—
>
> **(I)** the percentage determined under subparagraph (C), and
>
> **(II)** the population ratio for that region determined under subparagraph (D)(ii).

8 U.S.C. § 1153(c)(1)(E)(iv) provides in pertinent part as follows:

> **(iv) Redistribution of unused visa numbers**
>
> If the Secretary of State estimates that the number of immigrant visas to be issued to natives

in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions in proportion to the percentages otherwise specified in clauses (ii) and (iii).

8 U.S.C. § 1153(c)(1)(F)(2)-(3) provides in pertinent part as follows:

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa

under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

8 U.S.C. § 1153(d) provides in pertinent part as follows:

(d) Treatment of family members

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

8 U.S.C. § 1153(e) provides in pertinent part as follows:

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) of this section (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

8 U.S.C. § 1153(g) provides in pertinent part as follows:

(g) Lists

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) of this section and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

8 U.S.C. § 1154(a)(1)(I) provides in pertinent part as follows:

(I)(i) Any alien desiring to be provided an immigrant visa under section 1153(c) of this title may file a petition at the place and time determined by the Secretary of State by regulation. Only one

such petition may be filed by an alien with respect to any petitioning period established. If more than one petition is submitted all such petitions submitted for such period by the alien shall be voided.

(ii)(I) The Secretary of State shall designate a period for the filing of petitions with respect to visas which may be issued under section 1153(c) of this title for the fiscal year beginning after the end of the period.

(II) Aliens who qualify, through random selection, for a visa under section 1153(c) of this title shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected.

(III) The Secretary of State shall prescribe such regulations as may be necessary to carry out this clause.

(iii) A petition under this subparagraph shall be in such form as the Secretary of State may by regulation prescribe and shall contain such information and be supported by such documentary evidence as the Secretary of State may require.

P.L. 104-208, Div. C, Title VI Sec. 636 provides in pertinent part as follows:

SEC. 636. FEE FOR DIVERSITY IMMIGRANT LOTTERY.

The Secretary of State may establish a fee to be paid by each applicant for an immigrant visa described in section 203(c) of the Immigration and Nationality Act. Such fee may be set at a level that will ensure recovery of the cost to the Department of State of allocating visas under such section, including the cost of processing all applications thereunder. All fees collected under this section shall be used for providing consular services. All fees collected under this section shall be deposited as an offsetting collection to any Department of State appropriation and shall remain available for obligations until expended. The provisions of the Act of August 18, 1856 (11 Stat. 58; 22 U.S.C. 4212-4214), concerning accounting for consular fees, shall not apply to fees collected under this section.

61 FR *58730 ACTION: Notice of registration period and requirements for the fourth year of the Diversity Immigrant Visa Program provides in pertinent part as follows:

How Will Winners Be Notified?

Only successful entrants will be notified. They will be notified by mail at the address listed on their entry during the summer of 1997. Winners will also

be sent instructions on how to apply for an immigrant visa, including information on a new requirement for a special DV case processing fee. Successful entrants must complete the immigrant visa application process and meet all eligibility requirements under U.S. law to be issued a visa.

Being selected as a winner in the DV Lottery does not automatically guarantee being issued a visa even if the applicant is qualified, because the number of entries selected and registered is greater than the number of immigrant visas available. Those selected will, therefore, need to complete and file their immigrant visa applications quickly. Once all 55,000 visas have been issued, the DV Program for Fiscal Year 1998 will end.

SUMMARY OF ARGUMENT

At issue in this case is the constitutionality of the actions of the Immigration and Naturalization Service (INS)[1] and the Federal Bureau of Investigation (collectively "Government") in reference to their decision not to process Petitioners' application for diversity visas. The diversity visa statutes, 8 U.S.C. §§ 1153(c)-(g) and 8 U.S.C. § 1154(a)(1)(I),

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1. While the Immigration and Naturalization Service (INS) was the primary government actor in this case, the INS has recently been restructured and divided into a number of governmental agencies. The newly created Bureau for Citizenship and Immigration Services has assumed the role of issuing visas and granting immigration status to individuals. Since the present claim arose out of the actions of the INS, and for simplicity, this Application will use the term "INS" when referring to the governmental agency empowered to implement immigration law.

evidence the clear intent of Congress that each fiscal year the INS is to make every effort to issue all 55,000 diversity visas to aliens from low admission countries. The Government admits that in fiscal year 1998 it only issued 51,565 of the 55,000 available diversity visas, and that for seven months prior to the expiration of the 1998 fiscal year the Government failed to take any action whatsoever on the Nyagas' applications. The District Court correctly concluded that mandamus is appropriate in such circumstances and ordered the Government to process the Nyagas' applications "on the merits" as if the 1998 fiscal year had not ended. Mandamus relief is appropriate because the Nyagas established a clear right to the relief sought, the Government has a clear, non-discretionary duty to act, and no other adequate remedy is available. 28 U.S.C. § 1361. The Eleventh Circuit Court of Appeals erred in reversing the District Court's decision. The Court of Appeals incorrectly held the issue to be moot while ignoring the rules of statutory interpretation as well as the clear intent of Congress.

The Court should grant certiorari to this case because it presents a number of important federal questions. First, it calls into question the power of the Government to ignore Congressional intent with respect to directives concerning immigration policy. Second, it calls into issue the ability of the judiciary to fashion relief for immigrants who have been denied the opportunity to receive Congressionally mandated immigrant status simply as a result of inaction by the Government.

STATEMENT OF THE CASE

(i) *Course of Proceedings and Disposition Below.*

In 2001, Charles Kibaara Nyaga and Doin Kainyu Kibaara, ("Petitioners" or the "Nyagas"), claiming jurisdiction under 28 U.S.C. § 1331, sought an order from the Federal District Court for the District of Northern Georgia to compel the Immigration and Naturalization Service and the Federal Bureau of Investigation (collectively "Respondents" or the "Government") to process Charles' 1998 diversity visa application, as well as a preliminary injunction prohibiting the INS from taking further action on Charles' adjustment application until a final ruling has been issued. RI, 1 (Complaint)[2]. The Respondents agreed to comply with the injunctive request, resulting in the court entering a Consent Order. The Respondents filed a Motion to Dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim, and, in the alternative, a Motion for Summary Judgment. RI, 8 (Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment). The Petitioners opposed the Respondents' Motion and filed a Cross-Motion for Summary Judgment. RI, 17 (Plaintiffs' Cross-Motion for Summary Judgment). The district court denied the Respondents' Motion and granted the Petitioners' Motion. RII, 29 (Order) (*See* Exhibit "B").

The district court, invoking its *mandamus jurisdiction*, concluded that the INS had a clear, non-discretionary duty to process Charles' application. Thus, the district court ordered

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2. The designation "RI, 1" refers to a document in the Record as entered by the district court in conformity with the local rules. The Roman numeral "I" refers to the volume number and the second number (1) refers to the docket entity number. Any third number refers to the specific page of that entry.

Respondents to process Charles' application as though fiscal year 1998 had not ended. Respondents appealed the decision to the Eleventh Circuit Court of Appeals.

A three-member panel of the Eleventh Circuit Court of Appeals comprised of Chief Judge Edmondson and Circuit Judges Cox and Barkett, in a 2-1 decision by Chief Judge Edmondson and Circuit Judge Cox, held that even if the INS had a non-discretionary duty to process Charles' Adjustment Application, Charles' case was moot because he was no longer eligible to receive a diversity visa (*See* Exhibit A attached hereto). Therefore, the majority of the three-member panel vacated the District Court's Order and remanded the case with instructions to dismiss as moot. Circuit Judge Barkett dissented with a strong opinion stating that 8 U.S.C. § 1153(c) requires the INS to act on diversity visa applications and that the District Court properly found that mandamus is the appropriate remedy to compel the INS to perform its ministerial role under the Immigration and Naturalization Act (INA) and to adjudicate Charles' application.

Petitioners requested rehearing by the Eleventh Circuit Court of Appeals *en banc*, but the request was denied by the court (*See* Exhibit C). Petitioners now appeal to the Supreme Court of the United States.

(ii) ***Statement of the Facts***

In early 1997, Charles Nyaga, Petitioner, a Kenyan citizen present in the United States on a student visa, applied for an immigrant visa under the 1998 Diversity Visa program. (RI, 1 at 4) (Compliant). The program allows individuals from countries with traditionally low immigration rates to the United States to apply for immigrant status.

See 8 U.S.C. § 1153(c). In order to receive a diversity visa, an individual must first qualify for an application by being randomly selected in the diversity visa selection process, commonly referred to as the "Diversity Visa Lottery." *See* 8 U.S.C. § 1153(e)(2). These "lottery winners" may then apply for a visa, a process which requires that applicants meet a number of criteria, including an educational requirement and a criminal background check. *See* 8 U.S.C. § 1153(c)(2) and 61 FR 58730. However, being a "lottery winner" does not automatically guarantee the applicant a diversity visa. The lottery routinely yields more "winners" than available visas. This overselection is done in order to ensure that all 55,000 available visas are actually issued to qualified individuals. *See* 61 FR 58730.

In July 1997, Charles was notified that he had been selected as one of the "winners" of the 1998 Diversity Visa Lottery and he proceeded to apply for a diversity visa. RI, 1 at 4; RI, 9 at 1-2 (Declaration of Mary Adair). Since the INS ends its fiscal year at the end of September, the INS would not accept applications for 1998 diversity visas until the beginning of the program year on October 1, 1997. RI, 1. Charles submitted the first portion of his application, along with a derivative application for his wife, Doin, to the INS in October of 1997, and it was completed in February of 1998. RI, 9 at 2; RI, 17 at 2 (Plaintiffs' Statement of Material as to which there is no genuine issue of a material fact). On February 20, 1998, the INS forwarded fingerprint cards, a standard procedure required as part of the applicant's background check, to the Federal Bureau of Investigation (FBI). RI, 9 at 3. However, neither the FBI or the INS took any further action on the application. RI, 9 at 3.

INS procedure at the time instructed individuals not to follow up on their diversity visa application until the INS had contacted the applicant. For example, in the fall of 1997 when the INS gave Charles the Adjustment of Status application, the instructions stated that an applicant would be notified of an interview approximately 12-18 months after initial submission, and included the following statement: "While your application is pending before the interview, please DO NOT make inquiry as to the status of your case, since it will result in further delay." RI, 1 at 7-8. Moreover, effective September 22, 1997, the Atlanta District Office instituted a policy that prevents all direct contact between the applicants and the INS. RI, 1 at 8. A prominent sign displayed at the Atlanta District Office directs anyone with person-to-person inquiries to leave the INS building as direct contact with personnel is not allowed. RI, 1 at 8. Regardless, Charles attempted to follow up on his application numerous times. When Charles attended his I-765 Work Permit interview in February or March of 1998, Charles asked the INS representative about the status of his 1998 diversity visa and he was told that there was nothing that he could do except "to wait." RI, 1 at 8. In May or June 1998, when the Nyagas attended Doin's I-765 Work Permit interview, Mr. Nyaga again inquired about the status of his 1998 diversity visa and he was told by the INS representative that there was nothing that he could do except "to wait." RI, 1 at 9.

Although the INS Atlanta District Office purports to follow a policy that calls for diversity visas to be given high priority so that the applications are reviewed before the end of the fiscal year (Statement of INS employee as noted by the Federal District Court for Northern Georgia in *Potapova v. INS*, Civil Action No. 1:99-CV-0130-MHS at *2-*3 (N.D. Ga. 1999)), Charles' application was ignored

altogether after February 20, 1998. Between February 20, 1998, when the INS sent Charles' fingerprint cards to the FBI, and the date of the filing of the Complaint in this case, the Government did nothing whatsoever with respect to Charles' Application to Adjust Status. RI, 1 at 7; RI, 10 at 2 (Declaration of Kevin C. Aiston). Furthermore, between February 1998, when the INS forwarded the fingerprint cards to the FBI for Doin, Charles' spouse, and August 25, 2000, when the INS instructed Doin to report to the INS Application Support Center for the purpose of allowing the INS to take new fingerprints, the Government took no action on Doin's application whatsoever. RI, 1 at 10; RI, 10 at 2.

While the Diversity Visa Program had reserved 55,000 visas to distribute in 1998, only 51,565 diversity visas were ever issued. RI, 10 at 2.

REASONS FOR GRANTING THE PETITION

1. The Supreme Court Should Grant Certiorari Because The Case At Bar Presents An Important Federal Question Concerning The Ability Of The Executive Branch To Act Contrary To Congressional Power And Intent

Under Article I, § 8, of the United States Constitution, Congress is granted the power to "establish a uniform rule of Naturalization." This plenary power is exclusive; indeed, this Court has made it clear that "'over no conceivable subject is the legislative power of Congress more complete. . . .'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In implementing Congress' immigration directives, therefore, the Immigration and Naturalization Service (INS) *must* comply with all immigration legislation.

The primary reason that the case at bar should be granted certiorari is that the Eleventh Circuit's majority opinion permits the INS to ignore Congressional directives, effectively allowing the INS to usurp the exclusive power of Congress over immigration. In presenting its case before the Eleventh Circuit Court of Appeals, the INS appears to have taken "the position that it is free to completely disregard a Congressional directive." 323 F.3d 906 (11th Cir. 2003) (Barkett, J. dissenting) (*see* Appendix A at page 23a). By affirming the INS' contention that it cannot issue diversity visas after the end of the fiscal year, even if the sole reason for the lack of issuance is governmental inaction, the Eleventh Circuit rendered an entire section of the Immigration and Naturalization Act nugatory, in effect supporting the INS' usurpation of Congressional power. This poses a serious breach of the Constitution, and as such merits review before this honorable Court.

The Diversity Visa program (DV) was created by Congress to provide 55,000 diversity visas to be issued each fiscal year to individuals from countries that have had low rates of immigration to the United States. 8 U.S.C. § 1153(c); 22 C.F.R. § 42.33. A diversity visa confers legal permanent resident status to its holder. 22 C.F.R. § 42.33(c) provides that each fiscal year the number of applicants selected for further processing (i.e. a DV Program Winner) shall be "sufficient to ensure, to the extent possible, usage of *all visas* authorized under Immigration and Naturalization Act § 203(c) (8 U.S.C. § 1153(c)) for the fiscal year in question." (Emphasis Added.) The Department of State Notice applicable to the DV Program for 1998 states the following:

> Being selected as a winner in the DV Lottery does not automatically guarantee being issued a visa

> even if the applicant is qualified, *because the number of entries selected and registered is greater than the number of immigrant visas available.* Those selected will, therefore, need to complete and file their immigrant visa applications quickly. *Once all 55,000 visas have been issued, the DV Program for Fiscal Year 1998 will end.* (Emphasis Added.)

61 FR 58730, Notices, Department of State, Bureau of Consular Affairs; Registration for the Diversity (DV-98) Visa Program.

The diversity visa statutes do not address the proper course of action if the fiscal year ends and there are unissued visas and unprocessed applications remaining. As a result of such ambiguity, a court must interpret the law consistent with Congressional intent. Furthermore, according to this Court, when courts interpret immigration statutes, ambiguities in the law are interpreted in favor of the alien. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

It defies reason that Congress could have intended that an approved petition holder who submits his approved petition with seven months remaining in the fiscal year could become ineligible for a visa *solely* because of the Government's inaction. It is the intention of Congress that the Government process *all* applications if the applications are submitted prior to the end of the fiscal year. Indeed, this purpose is articulated at P.L. 104-208, Div. C, Title VI, § 636, September 30, 1996, 110 Stat. 3009-703, which provides that the Secretary of State is authorized to establish a fee to be paid by each applicant for a diversity visa which will ensure the recovery of the cost of processing "*all* applications thereunder" (Emphasis Added).

The intent of Congress to issue all 55,000 visas each year is further confirmed by the diversity statute itself (8 U.S.C. § 1153(c)), which sets forth precisely the method of determining which countries are allocated what percentage of the 55,000 visas, and at § 1153(c)(1)(E)(iv), which address the redistribution of excess visa numbers if the calculations for distribution among the countries results in less than all 55,000 visas being made available for distribution. Moreover, as pointed out in Judge Barkett's dissenting opinion in the Eleventh Circuit Court of Appeals, Congress chose to employ authoritative language, affirmatively directing action throughout the statutes that establish the diversity immigrant visa program. The term "shall" pervades 8 U.S.C. § 1153(c). In § 1153(c)(1) the introductory phrase states that "diversity immigrants *shall* be allotted visas (emphasis added)," and Congress repeated the term eleven more times in that particular statutory section. Thus, it is clear that Congress intended for all available diversity visas to be issued by the INS.

The Eleventh Circuit's ruling in this case ignores the intent of Congress and effectively frustrates the purpose of the Diversity Visa Program. Instead of focusing on the intent of Congress to issue all available diversity visas, the court's decision latched on to an unfounded interpretation of one sentence in the diversity visa statute. 8 U.S.C. § 1154(a)(1)(I)(ii)(II) provides that "Aliens who qualify, through random selection, for a visa under section 1153(c) of this title shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected." In its holding, the Eleventh Circuit Court of Appeals interpreted this sentence to mean that no visas can ever be issued once the fiscal year has expired, rather than that eligible aliens may *apply* for visas only through the end of a fiscal year. In effect, such a holding would give the INS

the power to arbitrarily ignore all valid and qualified visa applications throughout the entire fiscal year and then deny all of them after the end of the fiscal year. This interpretation clearly goes against the intent of Congress to issue all 55,000 available visas and would allow the Government to issue no diversity visas at all.

The procedures in place at the Atlanta District Office of the INS also clearly violate this Congressional intent. In 1997, the Atlanta District Office issued a letter to all adjustment applicants which stated:

> Approximately 12-18 months after receipt of your application, you will be notified as to the date and time to appear in this office for the required interview. While your application is pending, please DO NOT make inquiries as to the status of your case, since it will result in further delay. RI, 1 at 7-8.

As evidenced by this admitted procedure of the Government at the Atlanta District Office, it would be impossible for any diversity visa applicant to ever obtain a diversity visa in Atlanta because even if the applicant was called in for an interview at the earliest possible date (12 months), the fiscal year would have already ended and the petition would be denied.

The Nyagas followed all the required procedures and relied on the reading of the statute supported by Congressional intent when they applied for diversity visas. By February 1998, just over four months into the new fiscal year, the Nyagas had completed the application process for adjustment of status based on diversity visa eligibility.

On February 20, 1998, the INS forwarded to the FBI the fingerprint cards for Charles and Doin. Between February 20, 1998 and the end of the fiscal year, September 30, 1998, the Government took no action whatsoever with respect to the Nyagas' applications. Although the Government is *required* to conduct a complete background investigation, including an FBI fingerprint check, a CIA name check and a records check, in all diversity visa applications, the Government failed to comply with this duty. RI, 10 at 1.

In his Declaration, Kevin C. Aiston, the Deputy Chief of the Visa Office in the Department of State, incredibly states: "Neither Mr. Nyaga nor his wife completed the adjustment of status process prior to the end of the fiscal year, at midnight, September 30, 1998." RI, 10 at 1. This statement does not make sense because it was not the Nyagas who failed to complete the adjustment of status process. As admitted by the Government, as of February 1998, the Nyagas had completed their applications, and between February 20, 1998 and the end of the fiscal year on September 30, 1998, the Government did absolutely nothing on either application. RI, 9.

On the other hand, the Nyagas did everything in their power to cause the Government to act on their applications. Unfortunately, there was not much they were permitted to do. In the fall of 1997 when the Government gave Charles the Adjustment of Status application, the instructions included the following statement: "While your application is pending before the interview, please DO NOT make inquiry as to the status of your case, since it will result in further delay." RI, 1 at 7. Effective September 22, 1997, the Atlanta District Office instituted a policy that prevents all direct contact with the INS. RI, 1 at 8. A prominent sign is displayed

at the Atlanta District Office which directs anyone with an inquiry to leave the building as person-to-person inquiries are not allowed. R1, 1 at 8. When Charles attended his I-765 Work Permit interview in February or March of 1998, Charles asked the INS representative about the status of his 1998 diversity visa and he was told that there was nothing he could do except "to wait." RI, 1 at 8. In May or June, 1998, when the Nyagas attended Doin's I-765 Work Permit interview, Charles again inquired about the status of his 1998 diversity visa and he was similarly told by the INS representative that there was nothing he could do except "to wait." RI, 1 at 9. Further, as of the filing of the Complaint in this case, on May 15, 2001, the Government had still not taken any action whatsoever with respect to Charles' application (RI, 1 at 7); and the only action taken with respect to Doin's application was on February 28, 2001, when the Atlanta District Director denied Doin's application on the basis that the Government had never issued a diversity visa to Charles. R1, 1 at 12.

Clearly, there is a serious discrepancy between the INS' implementation of the Diversity Visa statute and Congressional intent, amounting to a usurpation of Congress' exclusive power over immigration. Moreover, this situation has caused serious damage to the Nyagas and thousands of other individuals who have applied for diversity visas. This harm will continue if the Eleventh Circuit's holding is left in place. Inaction by the Government must not be allowed to prevent the enactment of laws properly passed in accordance with Congress' plenary power over immigration. This amounts to a serious Constitutional problem that must be addressed by the Court.

2. The Supreme Court Should Grant Certiorari Because This Case Presents An Important Federal Question Concerning The Power Of The Judiciary To Fashion Relief For Parties Who Have Been Denied Diversity Immigrant Status Simply As A Result Of Inaction By The Government.

The Court should grant certiorari in this case in order to address the question of whether or not a federal court has the power to fashion relief for parties who have been denied a diversity visa solely as a result of inaction by the Government. In its opinion in the instant case, the Eleventh Circuit Court of Appeals, in a two to one decision, rejected Petitioners' contentions on the grounds that it had no mandamus jurisdiction over the case; therefore the issue was moot, and as such, the court could not grant relief. Such a decision incorrectly characterizes the federal judicial power. Case precedent and common legal principles indicate that such an approach is faulty and without foundation. For these reasons, the Court should grant certiorari to clarify the powers of the judiciary in regards to granting relief in diversity visa cases.

In its majority opinion, the Eleventh Circuit Court of Appeals relied heavily on *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002), a case which held that courts do not have the mandamus jurisdiction over cases in which the "alleged" statutory deadline for issuing diversity visas has passed. However, in citing *Iddir v. INS* with approval, the majority opinion does not address *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999) or *Marcetic v. INS*, 1998 WL 173129 (N.D. Ill. 1998), cases from the same circuit which were not overruled by *Iddir*. Indeed, the *Iddir* court's attempt to distinguish the case from *Paunescu* and *Marcetic* does not

change the valid key ruling in those cases, to-wit, that diversity visas can and have been legally issued after the end of the fiscal year.

In *Paunescu* and *Marcetic*, the Federal District Court for the Northern District of Illinois held that visas could be issued after the end of the fiscal year in certain circumstances. Specifically, the *Marcetic* and *Paunescu* courts allowed issuance of diversity visas after the end of the fiscal year when the INS failed to issue them pursuant to court orders entered during the applicable fiscal year. Since the *Paunescu* and *Marcetic* courts ordered the INS to issue the diversity visas after the end of the fiscal year, and whereas the INS did in fact issue such visas, it simply does not make sense for the *Iddir* court to conclude that diversity visas can never be issued after the end of the fiscal year.

Furthermore, there is clear evidence that the INS itself has notified aliens of the availability of diversity visas after the end of the applicable fiscal year, even without involvement of a court. In *Vladagina v. Ashcroft*, 2002 WL 1162426 (S.D.N.Y.), for example, the Plaintiff's complaint included a notice from the INS indicating the availability of a diversity visa. Although the applicable fiscal year had ended on September 30, 1999, the notice was dated December 22, 1999 and Mr. Vladagina was instructed to appear to obtain the visa on January 13, 2000. Clearly, the INS can and does issue diversity visas after the end of the applicable fiscal year. If the INS is capable of such an act, surely a court exercising its *mandamus jurisdiction* should be able to do the same.

Based on this apparent confusion and lack of cohesion concerning the role of the judiciary in issuing remedies to individuals who have been denied diversity visas because of government inaction, the Court should grant certiorari in this case.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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